UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 95-3163.

ROBERT CARNEY; SHEILA CARNEY, Appellees, v. BIC CORPORATION, Appellant.	* Appeal From The * United States * District Court For * The Eastern District * Of Missouri *

Submitted: April 10, 1996
Decided: July 8, 1996.

Before McMILLIAN and FAGG, Circuit Judges, and BURNS,* District Judge.

McMILLIAN, Circuit Judge.

BIC Corporation (BIC) appeals from a final order entered in the United States District Court[1] for the Eastern District of Missouri remanding to Missouri state court for want of federal jurisdiction the products liability action brought by Robert Carney and Sheila Carney, husband and wife (collectively plaintiffs) against BIC. *Carney v. BIC Corp.*, No. 4:95CV417-DJS (E.D.Mo. July 14, 1995) (Order). For reversal, BIC argues that the district court erred in holding that it lacked removal jurisdiction to entertain plaintiffs' action after the stipulated

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*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

[1] The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

dismissal of defendant Clifford Massie, d/b/a Massie One Stop (Massie), pursuant to Mo.Rev.Stat. § 537.762. For the reasons discussed below, we dismiss the appeal pursuant to 28 U.S.C. § 1447(d) for lack of jurisdiction.

I. Background

The underlying facts are not in dispute. Plaintiffs' two-year-old son died on January 30, 1992, because of injuries sustained while attempting to use a butane lighter manufactured by BIC. On July 28, 1994, plaintiffs filed the present wrongful death and personal injury action in the Circuit Court of the city of St. Louis against BIC and Massie, a commercial retailer who had sold the lighter to plaintiffs. BIC is incorporated in New York and has its principal place of business in Connecticut. At the time the present action was commenced, however, plaintiffs and Massie were residents of the State of Missouri. Therefore, diversity of citizenship did not exist between the parties when plaintiffs filed their complaint against BIC and Massie.

On January 11, 1995, Massie filed a motion seeking dismissal from plaintiffs' complaint pursuant to Mo.Rev.Stat. § 537.762 (1987).[2] As required by § 537.762(3), Massie's motion to

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[2] Mo.Rev.Stat. § 537.762 provides as follows: 537.762. Motion to dismiss, defendant whose liability is as seller in stream of commerce, requirements, procedure—order of dismissal.

1. A defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim as provided in this section.

2. This section shall apply to any products liability claim in which another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had for plaintiffs' claim.

3. A defendant may move for dismissal under this section within the time for filing an answer or other responsive pleading unless permitted by the court at later time shown.

dismiss was accompanied by an affidavit stating that he was aware of no facts or circumstances supporting his liability other than his status as a seller in the stream of commerce. On February 23, 1995, plaintiffs and Massie entered into a stipulation of dismissal, which provided that Massie "shall remain a party to this action only for the purposes of venue and jurisdiction as provided in ... § 537.762(6) (1987)." App. 71.

On March 3, 1995, BIC removed the present case to the United States District Court for the Eastern District of Missouri, alleging that the stipulated dismissal of Massie had created diversity of citizenship between the parties. Upon motion by plaintiffs, the district court entered an order remanding the case

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4. The parties shall have sixty days in which to conduct discovery on the issues raised in the motion and affidavit. The court for good cause shown, may extend the time for discovery, and may enter a protective order pursuant to the rules of civil procedure regarding the scope of discovery on other issues.

5. Any party may move for a hearing on a motion to dismiss under this section. If the requirements of subsections 2 and 3 of this section are met, and no party comes forward at such hearing with evidence of facts which would render the defendant seeking dismissal under this section liable on some basis other than his status as a seller in the stream of commerce, the court shall dismiss without prejudice the claim as to that defendant.

6. No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to this section shall be considered to remain a party to such action only for such purposes.

7. An order of dismissal under this section shall be interlocutory until final disposition of plaintiff's claim by settlement or judgment and may be set aside for good cause shown at anytime prior to such disposition.

Mo.Rev.Stat. § 537.762 (1987) (emphasis added).

to the Circuit Court of the City of St. Louis on July 14, 1995. This appeal followed.[3]

II. Discussion

The district court determined that a remand order was appropriate in the present case because the dismissal of Massie did not create removal jurisdiction based upon the diversity of the parties. In reaching this conclusion, the district court noted that the stipulation of dismissal expressly stated that Massie would remain a party to the action for the purpose of venue and jurisdiction, in accordance with § 537.762(6). The district court also held that § 537.762 was not, as BIC argued, an "impermissible attempt by state law to defeat removal jurisdiction." Slip op. at 2.

On appeal, BIC contends that the district court erred in remanding the present action to Missouri state court, because (1) § 537.762 does not apply where a co-defendant is dismissed by stipulation rather than by order and (2) § 537.762 was never intended to affect federal diversity jurisdiction, or alternatively, the statute is invalid to the extent that it limits diversity jurisdiction. We may not address the merits, however, unless we determine that we have jurisdiction to review the district court's remand order. Title 28 U.S.C. § 1447(d) provides that, with the exception of civil rights case, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346, 96 S.Ct. 584, 590, 46 L.Ed.2d 542 (1976) (*Thermtron*), the Supreme Court clarified that "only remand orders issued under § 1447(c)[4] and invoking the grounds

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[3] BIC also filed a petition for writ of mandamus on August 21, 1995. This court denied the petition on November 2, 1995.

[4] 28 U.S.C. § 1447(c) currently provides in pertinent part: "If at any time it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." At the time the Supreme Court decided *Thermtron*, however, § 1447(c) stated that "[i]f at any time before final judgment it appears that the case was removed improvidently and

specified therein ... are immune from review under § 1447(d)". *Id.* In *Thermtron*, the district court had remanded an otherwise proper diversity action solely because of its crowded docket. Concluding that the district court had exceeded its statutorily defined power by remanding the case on a basis not specified in § 1447(c), the Supreme Court held that a writ of mandamus was the appropriate remedy to compel the district court to entertain the action. *Id.* at 352-53, 96 S.Ct. at 593-95.

BIC contends that the present case falls within the *Thermtron* exception because the district court's remand order was not based upon a ground specified in 28 U.S.C. § 1447(c)—i.e., the lack of subject matter jurisdiction—but rather, was premised upon Mo.Rev.Stat. § 537.762(6), which provides that retailers who have been dismissed from products liability actions on the basis that their liability stems solely from their status as sellers in the stream of commerce shall remain defendants for purposes of venue and jurisdiction. In addition to *Thermtron*, BIC relies on *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988) (*Karl Koch*). In *Karl Koch*, the Second Circuit held that a remand order based on the district court's interpretation of a forum selection clause was reviewable because the district court had gone beyond the jurisdictional determination and made a decision affecting the merits of the case. *See id.* (reasoning that the policy underlying 28 U.S.C. § 1447(d)—preventing protracted litigation of jurisdictional questions—was inapplicable to remand orders based upon interpretation of forum selection clause); *see also Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984) (holding that remand order based on enforceability of forum selection clause was reviewable).

In response, plaintiffs argue that 28 U.S.C. § 1447(d) forecloses review of the remand order, because the order was based upon the district court's determination that, in light of Mo.Rev.Stat. § 537.762(6), it lacked removal jurisdiction to entertain plaintiffs'

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without jurisdiction, the district court shall remand the case."

action. Plaintiffs also maintain that the present case more closely resembles *Hansen v. Blue Cross*, 891 F.2d 1384, 1388 (9th Cir. 1989) (*Hansen*), than *Karl Koch*. In *Hansen*, the Ninth Circuit held unreviewable a remand order based upon the district court's determination that the insurance plan at issue was not subject to ERISA. *Id.* The Ninth Circuit reasoned that the remand order did not fall within the *Thermtron* exception because "[t]he district court's decision that Hansen's plan was not subject to ERISA, rather than being apart from the question of subject matter jurisdiction, was necessary to determine whether such jurisdiction existed." *Id.* Plaintiffs argue that the reasoning of *Hansen* also applies in the present case. We agree and hold that the district court's remand order is not reviewable on appeal.

We are bound by the general rule of non-reviewability of remand orders set forth in 28 U.S.C. § 1447(d). The remand order in the present case does not come within the *Thermtron* exception, because it was based on a ground specified in 28 U.S.C. § 1447(c)—the district court's determination that it lacked subject matter jurisdiction to hear the action. After noting that the stipulated dismissal provided that, in accordance with Mo.Rev.Stat. § 537.762(6), Massie would remain a party in the action for purposes of venue and jurisdiction, the district court concluded that the dismissal of Massie did not create removal jurisdiction based upon diversity of citizenship and remanded the present case to Missouri state court. Thus, the remand order was based solely upon the district court's conclusion that removal jurisdiction did not exist. Although the district court applied Mo.Rev.Stat. § 537.762(6) in reaching this conclusion, its consideration of § 537.762(6) was in no way separate from the jurisdictional determination. Therefore, the present case is distinguishable from *Karl Koch*, in which the remand order at issue was based upon a matter affecting the merits of the case. By contrast, the district court in the present case made no determinations concerning the substantive rights of the parties. Thus, the remand order falls squarely within 28 U.S.C. § 1447(d) and is foreclosed from appellate review.

III. Conclusion

We hold that the district court's order remanding the present case to the Circuit Court of the City of St. Louis is unreviewable on appeal.[5] Accordingly, we dismiss the appeal pursuant to 28 U.S.C. § 1447(d) for lack of jurisdiction.

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[5] Thus, we do not reach the merits of BIC's challenge to the remand order.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT CARNEY and SHEILA CARNEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 4:95CV
	)	417-DJS
	)	
BIC CORPORATION and CLIFFORD MASSIE d/b/a MASSIE ONE STOP,	)	
	)	
	)	
Defendants.	)	

ORDER

Plaintiffs filed the instant product liability action in the Circuit Court of the City of St. Louis against the manufacturer and retailer of a BIC butane lighter, seeking damages relating to the death of their two-year-old son. Section 537.762 R.S.Mo. provides for the dismissal from a product liability action of a defendant "whose liability is based solely on his status as a seller in the stream of commerce" so long as there remains a claim against "another defendant, including the manufacturer, ...from whom total recovery may be had for plaintiff's claim." Following dismissal of defendant Clifford Massie pursuant to § 537.762, defendant BIC Corporation removed the action to this Court on the basis of diversity. The matter is now before the Court on plaintiffs' motion to remand.

The propriety of removal turns on interpretation of subsection 6 and 7 of § 537.762, which provide as follows:

> 6. No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed

> pursuant to this section shall be considered to remain a party to such action only for such purposes.
>
> 7. An order of dismissal under this section shall be interlocutory until final disposition of plaintiff's claim by settlement or judgment and may be set aside for good cause shown at any time prior to such disposition.

Defendant Massie's dismissal in this case was pursuant to a stipulation of the parties which reads in pertinent part:

> By consent of the undersigned parties, Defendant Clifford Massie d/b/a Massie One Stop is hereby voluntarily dismissed from this action as provided in and pursuant to R.S.Mo. § 537.762 (1987) and shall remain a party to such action only for the purpose of venue and jurisdiction as provided in R.S.Mo. § 537.762(6) (1987).

The Court is not persuaded by BIC's contention that § 537.762.6 is an impermissible attempt by state law to defeat removal jurisdiction, analogous to those attempts which have been rejected in the case law upon which BIC relies. Furthermore, the Court concludes that the interlocutory nature of the dismissal pursuant to § 537.762 renders the voluntary-involuntary dismissal distinction insignificant in this context and makes a removal relying on the dismissal improper. The Court's construction and application of the Missouri statute is also in accordance with the general principle that the federal courts' removal jurisdiction is to be narrowly construed and any doubts should be resolved in favor of remand. *See, e.g.*, 14A Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3721 (1985).

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion to remand is granted.

IT IS FURTHER ORDERED that this matter be remanded to the Circuit Court of the City of St. Louis.

/s/ Donald J. Stohr
UNITED STATES DISTRICT JUDGE

Dated: 7/14/95

[Filed Feb. 24, 1995]

THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

ROBERT CARNEY and SHEILA CARNEY,	)	
	)	
Plaintiff,	)	
	)	Cause No.
vs.	)	942-9338
	)	Division 1
BIC CORPORATION and CLIFFORD MASSIE d/b/a MASSIE ONE STOP,	)	
	)	
	)	
Defendants.	)	

STIPULATION FOR DISMISSAL

By consent of the undersigned parties, Defendant Clifford Massie d/b/a Massie One Stop is hereby voluntarily dismissed from this action as provided in and pursuant to R.S.Mo. § 537.762 (1987) and shall remain a party to such action only for the purpose of venue and jurisdiction as provided in R.S.Mo. § 537.762(6) (1987).

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3163EMSL

ROBERT CARNEY; SHEILA CARNEY, Appellees,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
v.	*	
BIC CORPORATION, Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 7, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 95-3084EMSL

In re:	*	
Bic Corporation,	*	
	*	
Petitioner.	*	Petition for Writ of
	*	Mandamus
	*	
	*	

JUDGEMENT

Petition for writ of mandamus has been considered by the court and is denied.

November 2, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit.

RELEVANT MISSOURI STATUTE

537.762

Motion to dismiss, defendant whose only liability is as seller in stream of commerce requirements, procedure — order of dismissal to be interlocutory

1. A defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim as provided in this section.

2. This section shall apply to any products liability claim in which another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had for plaintiffs' claim.

3. A defendant may move for dismissal under this section within the time for filing an answer or other responsive pleading unless permitted by the court at later time for good cause shown. The motion shall be accompanied by an affidavit which shall be made under oath and shall state that the defendant is aware of no facts or circumstances upon which a verdict might be reached against him, other than his status as a seller in the stream of commerce.

4. The parties shall have sixty days in which to conduct discovery on the issues raised in the motion and affidavit. The court for good cause shown, may extend the time for discovery, and may enter a protective order pursuant to the rules of civil procedure regarding the scope of discovery on other issues.

5. Any party may move for a hearing on a motion to dismiss under this section. If the requirements of subsections 2 and 3 of this section are met, and no party comes forward at such a hearing with evidence of facts which would render the defendant seeking dismissal under this section liable on some basis other than his status as a seller in the stream of commerce, the court shall dismiss without prejudice the claim as to that defendant.

6. No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to

this section shall be considered to remain a party to such action only for such purposes.

7. An order of dismissal under this section shall be interlocutory until final disposition of plaintiff's claim by settlement or judgment and may be set aside for good cause shown at anytime prior to such disposition.